(2)

No. 07-699

IN THE

Supreme Court of the United States

FIVE STAR PARKING,
Petitioner,

v.

UNION LOCAL 723, affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION

RAYMOND G. HEINEMAN *
KROLL HEINEMAN GIBLIN
Metro Corporate Campus I
99 Wood Avenue South, Suite 307
Iselin, New Jersey 08830
(732) 491-2100

* Counsel of Record *Attorneys for Respondent*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OFAUTHORITIES	ii
STATEMENT	1
ARGUMENT	7
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
Bricklayers, Local 4 v. Associated General Contractors, 711 F. 2d 90 (8th Cir.1983)..	12
Colorado-Ute Electric Association, Inc. v. NLRB, 939 F. 2d 1392 (10th Cir. 1991)...	9
Eastern Associated Coal Corp. v. United Mine Workers, District 17, 531 U.S. 57 (2000).....	6, 7
Electrical Workers Local 47 v. NLRB, 927 F. 2d 635 (D.C. Cir. 1991).....	10
General Drivers Union, Local 554 v. Mid-Continent Bottlers, Inc., 767 F. 2d 482 (8th Cir. 1985).....	12
Hydrologics, Inc., 293 NLRB No. 129 (1989).....	8
Laundry Workers, Local 93 v. Mahoney, 491 F. 2d 1029 (8th Cir. 1974).....	12
Major League Baseball Players Association v. Garvey, 532 U.S. 504 (2001)	7
Major League Umpires Association v. American League of Professional Baseball Clubs, 357 F. 3d 272 (3rd Cir. 2004)...	7
Mulvihill v. Spalding Sports Worldwide Inc., 184 F. Supp. 2d 199 (D. Mass. 2002).....	11
Newspaper Guild of Salem v. Ottaway Newspaper, Inc., 79 F. 3d 1273 (1st Cir. 1996).....8, 10, 11	
Paperworkers v. Misco, Inc., 484 U.S. 29 (1987).....	7
Rubber Workers, Local 884 v. Bridgestone/ Firestone, Inc., 61 F. 3d 1347 (8th Cir. 1995).....	9

TABLE OF AUTHORITIES—Continued

	Page
Saunders House v. NLRB, 719 F. 2d 683 (3rd Cir. 1983)	8
Speedrack, Inc., 293 NLRB No. 128 (1989)	9

IN THE

Supreme Court of the United States

No. 07-699

FIVE STAR PARKING,
Petitioner,

v.

UNION LOCAL 723, affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

STATEMENT

Petitioner, Five Star Parking ("Five Star") is engaged in the management and operation of parking lots at various locations in the United States, including the parking lots and garages of the Port Authority of New York and New Jersey at Newark Liberty International Airport (herein "NLIA"). Five Star is an employer within the meaning of the Labor Management Relations Act, 29 U.S.C. §§152(2) and 185. Respondent, Local 723, a labor organization within the meaning of the Labor Management Relations Act, 29 U.S.C. §§152(5) and 185, is the exclusive

collective bargaining representative of the employees employed at the NLIA parking facility.

Five Star and Local 723 are parties to a collective bargaining agreement ("CBA"), which is effective by its terms from August 1, 2002 until July 31, 2008. In the CBA, at Article 4, Grievance Procedure, the parties broadly defined the grievances which may be submitted to binding arbitration:

> Section 1: Any controversy, claim, dispute or grievance arising between the Company and the Union or any Employee, involving or concerning the meaning, interpretation, operation, or application of any clause of this Agreement, or by a breach or threatened breach of this Agreement. . .

(App. 23a). In their CBA, the parties agreed on the wages to be paid to bargaining unit employees at Article 20, Pay Schedule and Wage Rates, and Schedule "A", by providing a wage schedule for the first year of the agreement; a 3% wage increase effective August 1, 2003, and, thereafter, wage increases only if either party sought to reopen the CBA as of August 1, 2004 or August 1, 2006, "solely for the purpose of negotiating concerning rates of pay and other monetary benefits". (App.26-27a). In the absence of either party seeking to reopen the CBA, the status quo remains in effect. At Article 32, Term of Agreement, the CBA references the re-opener negotiations and limits the parties right to resort to economic weapons:

> This Agreement shall become effective August 1, 2002 and shall remain in effect to and including July 31, 2008, and from year to year thereafter unless notice of desire to amend or terminate is given in writing by one party to the other sixty (60) days prior to the expiration date of this

> Agreement. It is agreed, however, that as of August 1, 2004, and August 1, 2006, this agreement may be reopened by either party (upon sixty (60) days of written notice) solely for the purpose of renegotiating concerning wages and monetary fringe benefits, but for no other purpose. It is further agreed that during such periods of reopener, the no-strike, no lockout provisions of this Agreement shall remain in full force and effect as shall all other non monetary terms and conditions hereof.

(App. 26a). While Article 32 explicitly prohibits strikes and lockouts during the re-opener negotiations, it does not explicitly address whether Five Star can unilaterally implement its position if re-opener negotiations become deadlocked.

On June 18, 2004, the Union invoked the wage re-opener provision of the CBA. The parties met briefly for two negotiation sessions during which the Company proposed to reduce labor costs by 12 ½%. Thereafter, Five Star declared an impasse and, on September 17, 2004, unilaterally implemented a 12½% reduction in the wages of bargaining unit employees.

On September 21, 2004, Local 723 filed a grievance, contesting the Company's unilateral implementation of the wage decrease as a violation of Article 20 and Schedule "A" of the CBA. On May 4, 2005, the labor arbitrator selected by the parties conducted a hearing, at which both parties attended and had full opportunity to present evidence and argument. At the hearing, the parties framed the specific contractual articles to be considered by the arbitrator, by stipulating to the following issue:

> Did the Employer violate Article 20 and Schedule A of the Agreement when on September 17, 2004, Five Star Parking implemented a wage reduction? If so, what shall be the remedy?

In an Opinion and Award, dated August 3, 2005, the arbitrator concluded that the Company did not engage in negotiations, as required by the Agreement. Accordingly, the arbitrator issued the following award:

> The grievance is sustained. The Employer's unilateral action of reducing the wages of bargaining unit members was in violation of the Agreement. Five Star Parking shall cease and desist from paying the decreased wage rate, which became effective September 17, 2004. All employees whose wages were reduced, including those who have left employment since September 17, 2004, shall be awarded back pay for the full amount of reduction of their salary that was in effect on September 5, 2004, to the day they receive their retroactive pay.

(App. 63a). In his supporting opinion, the arbitrator specifically set forth the provisions of the Agreement which he found to be relevant, including the re-opener provisions at Schedule "A", Section 2 and Article 32, Term of the Agreement. (App. 23-27a). The arbitrator made detailed factual findings, resolving various contested factual issues (App. 27-31a and 58a) and gave detailed consideration to the position and arguments of the parties. (App. 31-54a). The Arbitrator's review indicates that both parties recognized that the contractually provided "negotiating" process for wage re-openers incorporated the concept of "impasse".

The arbitrator specifically considered and rejected Five Star's argument that he was being asked to apply and interpret the National Labor Relations Act ("NLRA") and found that the broad language of the grievance procedure governed the issue at hearing. (App. 54-58a). Thus, the arbitrator clearly disavowed any interpretation of the NLRA and ruled that the issue presented was within his contractual authority to interpret the collective bargaining agreement. After reviewing the factual record (App. 58-61a), the Arbitrator concluded that the Employer's conduct breached the Agreement:

> Based on the facts in evidence, there is no question that the Employer's action on September 17, 2004, in reducing employees' wages was violative of the collective bargaining agreement.

(App. 58-61a). Implicit in his analysis was the recognition that the 2003 wages would remain in effect absent the negotiations of a re-opener, pursuant to Schedule "A", Section 2(b). The arbitrator specifically rejected the notion that Five Star's conduct was consistent with the "negotiating" required by the CBA. (App. 61-62a). The arbitrator also rejected the Company's contention that a valid impasse could exist after only two or three hours of bargaining. (App. 59-60a). Finally, the arbitrator was skeptical of whether a valid impasse could even develop, under the terms of the CBA, when it was unclear whether Five Star was going to continue to manage the parking facility for the Port Authority at NLIA. (App. 60a).

The Arbitrator crystalized his conclusion that Five Star beached the parties' agreement on wages, "The simple fact is that they reduced employees' wages without negotiations". (App. 61a). Based on his factual findings and his interpretation of the process of

negotiations mandated by Schedule "A" and Article 32, the Arbitrator concluded that Five Star breached the CBA.

On December 20, 2005, the District Court issued an Order granting Five Star's motion to vacate the award, accepting Five Star's argument that the arbitrator had not construed any term or provision of the CBA. (App. 18-19a). The Third Circuit applied the deferential standard set forth in *Eastern Associated Coal Corp. v. United Mine Workers, District 17*, 531 U.S. 57, 62 (2000), and upheld the arbitrator's decision, since he had acted within the scope of his authority and committed no error in applying the collective bargaining agreement. (App. 9-10a). The Circuit Court concluded that Five Star's agreement to the issue to be submitted to the arbitrator indicated both its agreement that the dispute was arbitrable and that it related to Article 20 and Schedule "A" of the CBA, "The wage re-opener provision in Schedule A of the CBA expressly requires that the parties negotiate; a refusal or failure to negotiate therefore would be a breach of the CBA". (App. 11a). The Third Circuit Court recognized that the stipulated issue presented a bona fide contractual dispute as to the Company's contractual obligation under Article 20 to "negotiate concerning rates of pay":

> The arbitrator declared an intent to decide whether there was a breach of contract, and in so deciding found that the parties failed to negotiate pursuant to the express terms of Schedule A of the CBA.

(App. 12a). As the award resolved an arbitral contractual issue under the terms of the CBA, the Circuit Court held that it should not be disturbed. *Id.*

ARGUMENT

The case presents the mundane and repetitive scenario of a party to a contractual labor dispute attempting to circumvent the grievance/arbitration process by seeking to vacate an arbitration award rendered by the labor arbitrator it chose. See *Major League Baseball Players Association v. Garvey*, 532 U.S. 504 (2001); *Eastern Associated Coal Corp., supra*; *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987); *Major League Umpires Association v. American League of Professional Baseball Clubs*, 357 F. 3d 272 (3rd Cir. 2004). In the instant case, Five Star is seeking to bypass the well-established standard of review, which focuses on whether the arbitrator could rationally derive his authority from the terms of the CBA, by arguing that the arbitrator considered issues reserved for the NLRB. In its petition, Five Star labors mightily to create the illusion of a split among the Circuit Courts and the NLRB in enforcing and administering the NLRA. Despite its effort, however, the asserted conflict is no more than an illusion to obfuscate a simple labor dispute over the meaning of the parties' CBA. A review of the cases relied upon by Five Star indicates nothing more than the Circuit Courts considering various disputes under differing contractual language and arriving at varying outcomes.

The petition for certiorari should be denied.

1. Despite the arbitrator's rejection of any suggestion that he was interpreting and applying the NLRA (App. 57-58a), Five Star nevertheless has argued that the arbitrator interpreted the term "impasse" under the NLRA. The NLRB's consideration of whether an employer is privileged to unilaterally implement terms and conditions of employment at impasse nor-

mally arises during negotiations for an initial agreement, *Saunders House v. NLRB*, 719 F. 2d 683 (3rd Cir. 1983) (impasse after 19 meetings), or for a successor agreement. *Newspaper Guild of Salem v. Ottaway Newspapers, Inc.*, 79 F. 3d 1273 (1st Cir. 1996). However, unfair labor practice issues unquestionably may arise in bargaining over wage and benefit re-openers, as recognized by the Third Circuit in its decision in the instant case. (App. 10-12a).

In *Hydrologics, Inc.*, 293 NLRB No. 129 (1989), the NLRB recognized that a union's right to strike during midterm re-opener negotiations was not waived by a general no-strike clause that did not address the re-opener situation. The NLRB, in *Speedrack, Inc.*, 293 NLRB No. 128 (1989), applied its reasoning to recognize the rights of an employer following an impasse in re-opener negotiations, absent an agreement between the parties constraining the right to unilateral implementation:

> the policies of the [NLRA] with regard to collective bargaining make it reasonable to read a contract re-opener provision as permitting the parties to respond to disputes over re-opened subjects by resort to the course of action normally allowed them when a contract has expired . . . By agreeing to a re-opener, the parties manifest their agreement to permit such measures unless they include language to the contrary.

Speedrack, 293 NLRB at 9-10. As recognized by the NLRB, the parties in their agreement may clearly limit the resort to economic weaponry during re-opener negotiations, including the right to unilaterally impose terms at impasse. In this regard, an employer's right to impose terms at impasse and a union's right to strike are both self-help measures

which are integral to the collective bargaining process regulated by the NLRB, in the absence of a collective bargaining agreement.

In the instant case, the parties' negotiations were pursuant to the re-opener provision of Appendix "A", Section 2. As noted by the arbitrator, Article 32 of the CBA explicitly limited the parties' resort to strikes and lockouts during re-opener negotiations. The contract expressly indicated that, during re-opener negotiations, the parties would not enjoy the usual full bargaining rights attendant upon expiration of the contract, contrary to the NLRB's normal presumption of full bargaining rights. The remaining issue of contract interpretation is whether and to what extent the Employer retained the economic weapon to unilaterally implement its last offer to decrease wages under the limited negotiations procedure provided by Article 20 and Schedule "A", Section 2. See *Rubber Workers, Local 884 v. Bridgestone/Firestone, Inc.*, 61 F.3d 1347 (8th Cir. 1995) (waiver of right to strike supported presumption of arbitrability over unilateral change in contractual health benefits). The arbitrator's award addressed the issue by concluding that the contractual limits on the strike weapon limited Five Star's corollary economic weapon of implementing terms at impasse.

The cases cited by Five Star, for the proposition that a split exists among the circuits on the issue in the instant case, are factually inapposite. In *Colorado-Ute Electric Association Inc. v NLRB*, 939 F. 2d 1392 (10th Cir. 1991), the Circuit Court set aside the NLRB's determination that an employer had unlawfully implemented mid-term merit increases, after twelve bargaining sessions with the

union, under an agreement which provided "either party may elect to negotiate wages in [the agreement] by giving notice to the other party." In *Electrical Workers, Local 47*, 927 F.2d 635, 645 (D.C. Cir. 1991), the Circuit Court for the District of Columbia concluded that an employer did not commit an unfair labor practice by implementing a final wage offer in re-opener negotiations following multiple negotiations sessions over a six month period. The CBAs in both *Colorado-Ute Electrical* and *Electrical Workers Local 47*, unlike the CBA in the instant case, did not limit the parties' resort to full economic weapons during re-opener negotiations. In both cases, the NLRB had applied its precedent that the parties to re-opener bargaining may resort to the full range of economic weaponry, including the imposition of terms at impasse, in the absence of contract language to the contrary. Further, none of the parties in either *Colorado-Ute Electrical* and *Electrical Workers Local 47* contended that the employer's unilateral implementation of changes in term and conditions of employment violated their CBA.

In the instant case, Five Star and Local 723 have agreed in their CBA to constrain the use of economic weaponry during re-opener negotiations, at Article 32 of the CBA. In contrast to the NLRB's presumption of full bargaining rights attendant during re-opener negotiations, as in *Colorado-Ute* and *Electrical Workers*, Five Star and Local 723 specifically contemplated that the use of economic weaponry would be prohibited in their re-opener negotiations.

Similarly, the First Circuit's ruling in *Newspaper Guild of Salem v. Ottaway Newspapers, Inc., supra*, relied upon by Five Star for its proposition that a split among the Circuits exists, is readily distin-

guished from the facts at bar. In *Ottaway*, during contract negotiations following a CBA's expiration, the Employer declared impasse. The Union sought to compel the Employer to submit the contract renewal to arbitration. The First Circuit concluded that the dispute did not raise "a colorable claim" of a contractual violation because the parties' contractual grievance/arbitration procedure specifically precluded arbitration over renewal of the agreement. In the absence of a colorable claim of a contract violation, the First Circuit found that the Union's requested relief amounted to an extra-contractual claim falling specifically within the NLRB's primary jurisdiction. In *Mulvihill v. Spalding Sports Worldwide, Inc.*, 184 F. Supp. 2d 199 (D. Mass. 2002), affd. 335 F. 3d 15 (1st Cir. 2003), the First Circuit affirmed a District Court's application of its holding in *Ottaway* to a plaintiff's allegation of an unfair labor practice and a breach of a collective bargaining agreement. The District Court, applying *Ottaway*, had exercised its concurrent jurisdiction under Section 301 because the plaintiff had alleged a colorable claim of a breach of a CBA. As recognized by the First Circuit, the results under its analysis in *Ottaway* is dependent on the language of the parties' CBA and is not dictated by the presence of a potential unfair labor practice issue.

The present matter is procedurally distinct from *Ottoway* because the parties were conducting reopener negotiations under the terms of their CBA, as opposed to post-expiration negotiations, governed solely by the NLRA. Further, the claims presented by the Union to the arbitrator were not extra-contractual. As the Circuit Court held in this matter, the statutory requirement to negotiate in good faith overlaps the contractual agreement, under Article 2(b) of the CBA, to "negotiat[e] concerning rates of

pay". Thus, it was proper for the arbitrator to interpret the contractual term of "negotiat[e] concerning rates of pay", under his authority to resolve disputes over "the meaning, interpretation, operation or application of [a] clause of this Agreement". Local 723's claim, as presented to the arbitrator, was not extra-contractual. Rather, Local 723 asked the arbitrator to act within the scope of his authority, construe the terms of the collective bargaining agreement and return the parties to the status quo, provided by Appendix "A", Section 2(a) of the CBA. Because this dispute involved contract interpretation under the parties' unique re-opener provision, this dispute does not implicate the primary jurisdiction of the NLRB, unlike the scenario presented in *Ottaway*.

Rather than indicating a split among the Circuit Courts, the Eighth Circuit cases relied upon by Five Star merely further illustrate the unremarkable fact that the results in specific cases in disputes over contractual re-openers are a function of the language of the disputing parties' CBAs. In *Laundry Workers, Local 93 v. Mahoney*, 491 F.2d 1029 (8th Cir. 1974), the Eighth Circuit affirmed an order submitting a wage dispute under a re-opener to binding arbitration, where the CBA prohibited strikes or lockouts during its term and the Employer was resistant to any change in wages. The Eighth Circuit in *Bricklayers, Local 4 v. Associated General Contractors*, 711 F.2d 90 (8th Cir. 1983), relied on a broad arbitration clause and a no-strike clause prohibiting strikes in advance of arbitration to order the submission of a dispute over a wage re-opener to arbitration, prior to either parties unilateral imposition of changes in terms and conditions of employment or resort to economic weaponry. The parties dispute in *General Drivers Union, Local 554 v. Mid-Continent Bottlers,*

Inc., 767 F.2d 482 (8th Cir. 1985), concerned the issue of whether the unilateral change implemented by the Employer, following an impasse in re-opener negotiations, was permitted by a CBA which limited the re-opener to certain portions of the agreement if the employer went to an "advance sell-system" for route drivers.

There is simply no split among the Circuit Courts. The results in the cases cited by Five Star are dependent on the facts of each case, and, most importantly, the language of the arbitration provisions, re-opener provisions and no-strike clauses of the particular CBAs at issue, all of which are distinguishable from this matter.

2. The award in the instant case drew its essence from the CBA and resolved an issue within the contractual authority of the arbitrator. The parties' jointly submitted issue in the instant case asked the arbitrator the simple and pointed question:

> Did the Employer violate Article 20 and Schedule A of the Agreement when on September 17, 2004, Five Star Parking implanted a wage reduction? If so, what shall be the remedy?

(App. 22a). This jointly submitted issue focused the arbitrator's attention on the specific language of the CBA at issue in their dispute. The arbitrator was asked specifically whether the Employer's actions violated the identified contractual provisions. In answering the issue in the affirmative, the arbitrator firmly grounded his award in the CBA between Five Star and Local 723. The arbitrator cited the specific contractual provisions upon which he relied. (App. 23-27a). After a lengthy review of evidence before him, he concluded by interpreting the requirement

for negotiations set forth in Schedule "A", "The simple fact is that they reduced employees' wages without negotiations." (App. 61a). Accordingly, in the absence of bona fide re-opener negotiations required by the CBA, as he interpreted it, the arbitrator concluded that Five Star breached the CBA. (App. 63a).

In the instant case, the arbitrator's award was limited to the dispute in question. The arbitrator was governed by the CBA and restricted himself to the facts presented during the hearing by the parties. Based on his interpretation of the CBA, the arbitrator merely held that the Employer's unilateral reduction in wages breached the agreement and, accordingly, he awarded a return to the status quo wage levels established by the parties at Schedule "A", Section 2(a). As the arbitrator's award drew its essence from the CBA, the Circuit Court properly upheld the award consistent with the applicable standard of review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND G. HEINEMAN *
KROLL HEINEMAN GIBLIN
Metro Corporate Campus I
99 Wood Avenue South, Suite 307
Iselin, New Jersey 08830
(732) 491-2100

* Counsel of Record

Attorneys for Respondent